



CITY OF EDMONDS

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HEARING EXAMINER

MIKE COOPER
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DEC 27 2011

PLANNING DEPT.

BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

RE: Stuart Retaining Wall Variance PLN-2011-0073	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
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INTRODUCTION

The Applicants request a street setback variance to construct a retaining wall. An existing rockery that supports the driveway on the subject property has failed. In order to shore up the rockery, a retaining must be constructed around the rockery. The variance request is approved.

ORAL TESTIMONY

Staff Testimony:

Kernen Lien, Associate Planner at City of Edmonds, stated that the application is a variance for reduced street setbacks in order to allow the construction of a retaining wall to shore up a failed rockery. According to Mr. Lien, the setbacks for the property would normally be 25ft from the street under ECDC. The rockery was filled in compliance with ECDC 18.40.020, he noted, because the area is potentially hazardous due to slopes of greater than 40 feet. The only way to shore up the rockery is to create a retaining wall which would reduce the setbacks, Mr. Lien said. Retaining walls that are over 3 feet in height are supposed to meet the setback requirements; this wall is 12 feet in height, he noted. Mr. Lien testified that staff feels that the retaining wall meets the variance criteria because the drive-way for the property could fail without the retaining wall. Staff has recommended approval with the condition that the recommendations of the geotechnical report done by Liu and Associates be followed.

Upon questioning by the hearing examiner, Mr. Lien noted that the house is located 25ft from the street setback. The filled part of the rockery is in between the house and the property line. Mr. Lien testified that the geotechnical report found that it would be too dangerous to remove the rockery and has recommended a geomesh grid

1 to support the retaining wall. If the retaining wall was put at the setback line, it
2 would not properly shore up the failed rockery, he concluded.

3 **Applicants' Testimony:**

4 Richard Stuart, Applicant, stated that the street shown on the map provided is actually
5 a 35ft easement that is fully wooded. In order to access the house on the property, the
6 city originally approved an extension of the rockery onto the easement. Mr. Stuart
7 remarked that his original wish was to fill the rockery, but that was not possible. Mr.
8 Stuart noted that they are also unable to remove the rocks because that would cause
9 the driveway to be at risk of collapsing so the retention wall is necessary. Mr. Stuart
asserted that the retention wall would not be visible to any neighbor. He testified that
the house is basically invisible from anywhere but the ferry because of its location
and heavy growth around it.

10 **Public Testimony:**

11 Alvin Rutledge stated that he wants to ensure that the city of Edmonds is not liable in
12 case there is a major disaster in which the retaining wall fails.

13 **Staff Rebuttal:**

14 Kernen Lien noted that the geotechnical report does address the stability of the
15 retaining wall, but he said he could not comment on city liability regarding a major
disaster.

16 **Applicants' Rebuttal:**

17 Richard Stuart testified that the retaining wall would provide more stability than the
18 failed rockery in case of a major disaster.

19 **EXHIBITS**

20 See the exhibit list on page 8 of the November 29, 2011 Staff Report. Attachments 1-
21 11 were entered as Exhibits 1-11 at the hearing in addition to the staff report.

22 **FINDINGS OF FACT**

23 **Procedural:**

- 24 1. Applicants. The Applicants are Richard and Barbara Stuart.
- 25 2. Hearing. The Hearing Examiner conducted a hearing on the application
on December 8, 2011 at 3:00 p.m. at the Edmonds Public Safety Complex in the
Council Chambers.

1 **Substantive:**

2 3. Site/Proposal Description. The subject property is single family residence
3 within a single family residentially zoned neighborhood. The subject property is part
4 of a larger west facing slope which contains an existing residence that has been
5 constructed into the hillside. There is an existing rockery fronting a currently wooded
6 35 foot easement on the west side of the property. This rockery supports the driveway
7 on the subject property. Beyond the driveway, the property slopes down at
8 approximately 44%. The site contains and is adjacent to critical areas, specifically
9 Geologically Hazardous Areas (Erosion Hazard Area and Landslide Hazard Area)
pursuant to ECDC 23.40 and ECDC 23.80. The existing rockery extends beyond the
northern boundary of the subject property. According to the Applicants' testimony,
the City originally approved the extension of the rockery within the easement to allow
access to the house on the property. The rockery has failed.

10 In order to shore up the failed rockery, a retaining must be constructed around the
11 rockery. The topography on the site is such that the retaining wall will be
12 approximately twelve feet in height. Retaining walls over three feet in height are
13 subject to zoning setbacks. The property is zoned RS-12 (Single-Family Residential)
14 which has 25 foot street setbacks. The retaining wall will encase the failed portion of
the retaining wall on the subject property and extend just to the northern property
boundary. The variance request is to reduce the street setback to zero feet in order to
construct the retaining wall.

15 4. Need for Variance. The variance is the minimum necessary to stabilize the slope.
16 As concluded in the Applicants' geotechnical report and by the Applicants'
17 contractor, an attempt to remove and/or replace the rockery would endanger the
18 persons working upon it and could also destabilize the driveway. The addition of the
retaining wall at the proposed location is the only reasonable means of stabilizing the
slope.

19 5. Characteristics of the Area. The site is located in a residential
20 neighborhood in central Edmonds with all surrounding property being zoned RS-12.
21 Most of the residences within the neighborhood are situated on their properties in a
22 way to take advantage of the views of Puget Sound and the Olympic Mountains
provided by the west facing slope.

23 6. Adverse Impacts. No adverse impacts are evident from the record. The
24 Applicants' geotechnical report, attachment 6 to the staff report, concluded that the
25 proposal will not impact adjacent property and that the risk of landslides should be
minimal if the extensive mitigation measures recommended in the report are
followed. Indeed, the purpose of the project is to prevent landslides from occurring
so that the project creates a strong public benefit. Mr. Rutledge testified of concerns
regarding City permitting liability for this project. The project will be condition on
negotiating a waiver of liability for the City. As testified by Mr. Stuart, the retaining

1 wall will not be within view of any adjoining residences because of heavy vegetation,
2 which is consistent with aerial photographs as shown in Attachment 9 to the staff
3 report. Consequently no aesthetic impacts are anticipated.

4 **CONCLUSIONS OF LAW**

5 **Procedural:**

6 1. Authority of Hearing Examiner. ECDC 20.85.020 provides the Hearing
7 Examiner with the authority to review and act upon variance applications as Type III-
A decisions in accordance with ECDC 20.06

8 **Substantive:**

9 2. Comprehensive Plan and Zoning Designations. The Comprehensive Plan
10 designates the site as "Single Family – Resource". The area is zoned Single-Family
11 Residential (RS-12).

12 3. SEPA Compliance and Notice. The proposed use is exempt from SEPA
13 requirements pursuant to WAC 197-11-800(6)(b). As noted on page 2 of the Staff
14 Report, notice of the setback variance was given by newspaper, postings in the
required locations, and by mail to nearby property owners within 300 feet of the site.
No comments were received.

15 4. Alteration of Critical Area Excluded from Decision. The notice discussed
16 in Conclusion of Law No. 3 was only provided for the setback variance. No notice
17 was provided for a proposed alteration to critical areas. Consequently that decision
is not necessary for approval of that determination.

18 The proposal to alter critical areas is clearly a separate permit decision that requires
19 notice if consolidated with the requested setback variance. ECDC 23.40.170 provides
20 that any alteration of critical areas as authorized by ECDC 23.40.160 shall be
21 approved as a decision of the Director of Community services. ECDC 23.40.170
further provides that the Director shall issue a notice of decision to the applicant and
22 that the decision then be available for consideration in the next phase of development.
A critical areas determination is also classified as a Type I decision under ECDC
23 20.01.003, which requires approval by the Director. Despite the requirement that the
24 Director is assigned the decision making role for application of ECDC 23.40.160,
Section X(2)(G) of the staff report provides that the Examiner's decision on the
25 setback variance will serve as the Director's decision on the critical area alteration.

1 Designating the Examiner as the decision maker for the critical areas determination
2 would be arguably¹ acceptable as a consolidated review. ECDC 20.01.002(B)
3 authorizes the consolidation of multiple permits. However, ECDC 20.01.002(B) also
4 provides that consolidated permits shall be processed “collectively” under the highest
5 numbered procedure required for any part of the application. The setback variance is
6 a Type III-B application, which makes it the highest numbered procedure of the
7 consolidation. If the critical areas determination is consolidated with the setback
8 variance, it too should be processed as a Type III-B application, which includes the
9 public notice requirements of ECDC 20.02.003. Nothing in the record shows that any
10 notice provided for the hearing of this action included consideration of the critical
11 areas determination. The Notice of Development Application and Public Hearing
12 included in Attachment 10 to the staff report only identifies the setback variance. The
13 summary of proposed action in the staff report also only identifies the setback
14 variance. The public has no reasonable way of knowing that the proposal also
15 includes an alteration to critical areas without reading the entire staff report.

16 The failure to properly consolidate the critical areas determination should not prove
17 fatal to the processing of this application. The staff recommendation on the critical
18 areas determination will be construed as the formal Director determination required
19 by ECDC 23.40.170, which was distributed to the Applicants when they received the
20 staff report on the setback variance. Reframed as a Type I decision, no separate
21 notice to the public of the critical areas determination was necessary. The
22 reclassification of the critical areas determination as a Type I decision at this point in
23 the proceedings has not limited any public input on the determination. In fact,
24 initially classifying the determination as a Type III-B decision provided more
25 opportunity for comment on the determination than was required by City regulations.
Any error in this procedure should be construed as harmless² by a reviewing court.

5. Review Criteria and Application. The Applicants seek a variance from the
25 foot street setback imposed by ECDC 16.20.030 for the RS-12 district. The
retaining wall will be approximately twelve feet in height. Retaining walls over three
feet in height are subject to zoning setbacks. The retaining wall will be located zero
feet from the western property line along a currently wooded 35 foot street easement
that provides access to seven homes. ECDC 20.85.010 governs the criteria for

¹ Consolidation would only be “arguably” valid because ECDC 23.40.170 expressly provides that an
alteration decision be issued prior to further review of the project, suggesting an intent to require
resolution of critical area issues in advance of further project review so that information relating to the
conditions and restrictions of such a decision can be considered by subsequent decision makers. There
are obvious practical problems with such an interpretation, but it is not necessary to resolve the issue at
this time.

² The Applicants may very well have a right to claim that it was deprived of an opportunity to appeal
the critical areas determination because the determination was not distributed to it as a final
administrative determination. The Applicants are free to request reconsideration on that basis, in
which case the Examiner will deny the application without prejudice in order to provide staff with a
second opportunity to correctly process the application.

variances to ECDC Title 16. The variance criteria set by ECDC 20.85.010 are quoted below and applied through corresponding conclusions of law.

ECDC 20.85.010: *No variance may be approved unless all of the findings in this section can be made.*

ECDC 20.85.010.A(1) – Special Circumstances: *That, because of special circumstances relating to the property, the strict enforcement of the zoning ordinance would deprive the owner of use rights and privileges permitted to other properties in the vicinity with the same zoning.*

- a. *Special circumstances include the size, shape, topography, location or surroundings of the property, public necessity as of public structures and uses as set forth in ECDC 17.00.030 and environmental factors such as vegetation, streams, ponds and wildlife habitats.*
- b. *Special circumstances should not be predicated upon any factor personal to the owner such as age or disability, extra expense which may be necessary to comply with the zoning ordinance, the ability to secure a scenic view, the ability to make more profitable use of the property, nor any factor resulting from the action of the owner or any past owner of the same property;*

6. As described in Findings of Fact No. 3 and No. 4 and page seven of the Staff Report, the subject property is part of a larger west facing slope. The existing residence and driveway appear to have been cut into the hillside with the rockery constructed to support the driveway. With the failure of the rockery, the driveway and only access to the residence is threatened. Since the City no longer permits rockeries within landslide hazard areas, the only way to shore up the rockery and driveway is with the retaining wall. Because of the slope of the hillside, the existing rockery extends beyond the northern property boundary. With the special circumstances of the subject site, the only way to construct the retaining wall and shore up the rockery is to build the retaining wall to the northern property boundary and within the street setback. Special circumstances exist on the subject site. The zoning request is justified.

ECDC 20.85.010(B) – Special Privilege: *That the approval of the variance would not be a grant of special privilege to the property in comparison with the limitations upon other properties in the vicinity with the same zoning;*

7. The retaining wall is necessary to support the driveway which is the only means of access to the existing single-family residence at the subject property. This residence is an existing permitted primary use in the RS-12 zone. This variance would not grant special privilege to the property since all property owners have access to their properties.

1 **ECDC 20.85.101(C) – Comprehensive Plan:** *That the approval of the variance will*
2 *be consistent with the comprehensive plan;*

3 8. The Comprehensive Plan generally encourages high-quality residential
4 development compatible with surrounding uses and the natural environment, which
5 minimizes encroachment on views of existing homes, and supports the rehabilitation
6 of older housing. The Comprehensive Plan states grading should not jeopardize the
7 stability of any slope or of an adjacent property. The Comprehensive Plan specifically
8 discourages the construction of retaining walls on steep slopes and stipulates retaining
9 walls should not support construction of improvements which do not conform to the
10 topography.

11 The proposed retaining wall is compatible with other development in the
12 neighborhood which was developed on slopes and is served by many retaining walls.
13 As testified by Mr. Stuart, the easement retaining wall will not be visible from any
14 adjoining properties due the heavily wooded nature of the area. The retaining wall
15 will not encroach on neighboring properties' views and is necessary to support the
16 retention and rehabilitation of the existing house without supporting the construction
17 of any other improvements on the subject property. Without the proposed retaining
18 wall, the existing failed rockery may deteriorate to the point where the existing home
19 is no longer accessible. The Applicants' geotechnical report indicates that the
20 proposed retaining wall will not jeopardize the slope as long as the recommendations
21 of the report are followed. The proposed retaining wall is not a new structure, but the
22 rehabilitation of an existing structure where no other feasible engineering solutions
23 are available. The variance is therefore consistent with the Comprehensive Plan and
24 meets this criterion.

25 **ECDC 20.85.010(D) – Zoning Ordinance:** *That the approval of the variance will be*
consistent with the purposes of the zoning ordinance and the zone district in which
the property is located;

9. Approval of the variance request will result in the construction of a
retaining wall supporting the existing driveway to an existing single-family home.
With the exception of the requested variance, this proposal is consistent with ECDC
16.20 with respect to development intensity, use and all other setbacks. Continued
access, as enabled through the granting of this variance, serves the purpose of the
zoning ordinance. This variance requirement has been satisfied.

ECDC 20.85.010(E) – Not Detrimental: *That the variance as approved or*
conditionally approved will not be significantly detrimental to the public health,
safety and welfare or injurious to the property or improvements in the vicinity and
same zone;

10. As determined in Finding of Fact No. 6, the proposal is fully mitigated
and will not create any significant adverse impacts. It is also necessary to stabilize a
slope. Consequently the criterion quoted above is satisfied.

1 **ECDC 20.85.010(F) – Minimum Variance:** *That the approved variance is the*
2 *minimum necessary to allow the owner the rights enjoyed by other properties in the*
3 *vicinity with the same zoning.*

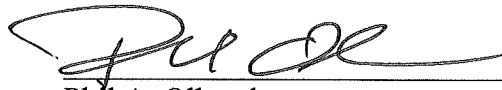
4 11. As determined in Finding of Fact No. 4, the variance is the minimum
5 necessary to correct the currently failing rockery and allow the property owners
6 continued use of the property.

7 **DECISION**

8 All variance criteria are met and the setback variance request is approved with the
9 following conditions:

- 10 1. The Applicants shall comply with all mitigation measures recommended in the
11 geotechnical report attached as Attachments 6 and 7 of the staff report.
- 12 2. A covenant waiving City liability shall be recorded on the property as authorized
13 by *1515--1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales*
14 *Corp.*, 146 Wash.2d 194 (2002).

15 Dated this 22nd day of December, 2011.

16 
17 Phil A. Olbrechts
18 Edmonds Hearing Examiner

19 **Appeal Right and Valuation Notices**

20 This decision is final and only subject to appeal to superior court as governed by
21 Chapter 36.70C RCW. Appeal deadlines are short (21 days from issuance of the
22 decision) and the courts strictly apply the procedural requirements for filing an appeal.

23 Affected property owners may request a change in valuation for property tax purposes
24 notwithstanding any program of revaluation.